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Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-961

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, and EMPIRE CITY SUBWAY COMPANY (LIMITED),

Petitioners,

v.

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, INDUSTRIAL COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, and JAMES H. TULLY, JR., STATE COMMISSIONER OF TAXATION & FINANCE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

Supreme Court of the United States

October Term, 1977

No. 77-961

New York Telephone Company, Western Electric Company, American Telephone & Telegraph Company, Long Lines Department, and Empire City Subway Company (Limited),

Petitioners,

v.

New York State Department of Labor, Louis L. Levine, Industrial Commissioner of the New York State Department of Labor, New York State Department of Taxation & Finance, and James H. Tully, Jr., State Commissioner of Taxation & Finance,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

Opinions Below

The opinion of the Court of Appeals for the Second Circuit[1] is reported at 566 F.2d 388 (1977). It also appears

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[1] Meskill, Circuit Judge, Bryan and Stewart, District Judges of the Southern District of New York.

in the appendix to the Petition for Certiorari herein (Pet. 1a-18a) and is unofficially reported at 96 L.R.R.M. 2921. It reverses the decision of the United States District Court for the Southern District of New York (Owen, J.) (Pet. 23a-54a), reported at 434 F. Supp. 810 and 95 L.R.R.M. 2487, which held the payment of unemployment compensation to strikers under the New York Labor Law to be an unconstitutional infringement upon federal labor policy.

Jurisdiction

A Petition for Certiorari was filed on January 4, 1978, within 90 days of the entry of the judgment of the Court of Appeals for the Second Circuit on November 9, 1977. Certiorari was granted by this Court on March 27, 1978. The Court's jurisdiction rests on 62 Stat. 928, 28 U.S.C. §1254(1).

Constitutional Provision and Statutes Involved

Article VI, Clause 2, of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.

Section 592.1 of the New York Labor Law (McKinney 1977) provides for the payment of unemployment compensation to strikers after a "Suspension of accumulation of benefit rights":

> 1. Industrial controversy. The accumulation of benefit rights by a claimant shall be suspended during a period of seven consecutive weeks beginning with the day after he lost his employment because of a strike, lockout, or other industrial controversy in the establishment in which he was employed, except that benefit rights may be accumulated before the expiration of such seven weeks beginning with the day after such strike, lockout, or other industrial controversy was terminated.

The pertinent federal labor policy is embodied in the National Labor Relations Act, *as amended* (hereinafter "NLRA"), 29 U.S.C. §§141 *et seq.*, and is described at pages 20-22, *infra*.

Questions Presented

1. Whether Congress, in fashioning a comprehensive national labor policy mandating government neutrality in labor disputes and leaving the area of collective bargaining to the free play of economic forces, intended that the several states be permitted to grant unemployment compensation to strikers at the expense of the struck employer.

2. Whether the federal policy of government neutrality in collective bargaining must give way to state enactments granting employer-financed unemployment compensation to strikers, regardless of the adverse impact of such benefits on free collective bargaining.

Statement of the Case

A. *The Proceedings.*

The commencement of this suit on October 24, 1973,[2] followed a seven-month long strike against petitioners[3] by the New York locals of the Communications Workers of America, AFL-CIO ("CWA"), during which some $49,000,000 in unemployment insurance benefits were paid out to some 33,000 strikers (Pre-Trial Order ("PTO") ¶35 b, c, A. 59).[4] Since New York unemployment insurance benefits are financed entirely by employer contributions assessed on the basis of experience rating, the full cost of these payments was debited against and borne by the struck employers (Pet. 6a).

The complaint sought, along with other relief, a judgment declaring the New York statute providing unemployment compensation for strikers unconstitutional. Respondents moved for a summary judgment dismissing the complaint and the District Court (Owen, J.) denied the motion in all respects (Memorandum Opinion #42,125, filed March 31, 1975, appearing at Pet. 55a-56a).

The issue of liability was first and separately tried, with the understanding that the question of the amount of monetary damages would subsequently be heard if the statute in question were found to be unconstitutional. The trial

[2] The District Court had jurisdiction of this case under 28 U.S.C. §§1331, 1337 and 1343. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars in respect to each of the plaintiffs-petitioners.

[3] Hereafter sometimes collectively referred to as "the Bell Companies". Respondents are collectively referred to herein as "the State".

[4] Reference is to the Joint Appendix herein.

consumed nine days, during the course of which the District Court heard twelve witnesses and received approximately 450 exhibits. On May 23, 1977, the District Court issued its Opinion and Order declaring the New York statute unconstitutional to the extent it provides unemployment compensation to strikers (Pet. 23a-54a). It further found that recovery of damages would not be barred by the Eleventh Amendment (Pet. 53a-54a). Thereafter, on June 24, 1977, the District Court issued its Declaratory Judgment and Order for Permanent Injunction (Pet. 19a-22a), subsequently entered on June 27, 1977.

On November 9, 1977, after an expedited appeal, the Court of Appeals for the Second Circuit reversed the decision below and remanded with instructions to dismiss the complaint (Pet. 1a-18a).

B. *The Facts.*

The facts in this case, as found by the District Court (Pet. 24a-28a), were implicitly accepted by the Court of Appeals (Pet. 5a-6a). In the words of the Court of Appeals, they proved a "conflict between New York's statute and the broad federal policy of free collective bargaining" (Pet. 17a). And, as stated by the District Court, "to the extent it [the New York statute] provides for the payment of unemployment compensation to strikers [it] is state intervention on behalf of the strikers, causes an employer to finance its own strikers, [and] is in conflict with federal labor policy" (Pet. 54a).

Notwithstanding this proven conflict, the Court of Appeals reversed the finding below of unconstitutionality on the ground that Congress, in effect, had granted the several states *carte blanche* to provide unemployment compensa-

tion to strikers regardless of the impact thereof on the federal labor policy of government neutrality in labor disputes and of free collective bargaining.

New York's Unemployment Insurance Law grants striking employees unemployment compensation after a combined suspension and waiting period of eight weeks. N.Y. Labor Law §§590.9, 592.1 (McKinney 1977).[5] No showing of need is required to entitle a striker to weekly benefits which, under present law, amount to a maximum of $115.00 and, as of September 1978, will be increased to $125.00.[6] All such benefits, as earlier stated, are financed by the struck employer.

The District Court

> regard[ed] it as a fundamental truism that the availability to, or expectation or receipt of a substantial weekly tax-free payment of money by, a striker is a substantial factor affecting his willingness to go on strike or, once on strike, to remain on strike, in the pursuit of desired goals. [Pet. 28a; footnotes omitted]

It, however, did not simply rely on this truism. In making its findings of fact, it found in the extensive record before it "confirmation of . . . [the truism] everywhere" (Pet. 28a).

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[5] Rhode Island has a similar law requiring a waiting period of seven weeks. R.I. Gen. Laws §28-44-16. Other states have different laws under which unemployment compensation is paid to strikers. There are at least 15 other lawsuits presently pending in the federal courts challenging laws of this kind on federal labor law preemption grounds. These cases are cited at page 15 of the Petition herein and at page 6 (first footnote) of Petitioners' Reply Brief.

[6] The maximum was $75.00 during the 1971-1972 strike involved in this case.

The record abounds with proof of the widespread and growing recognition throughout the labor community that this form of state-ordered (but employer-financed) cash subsidy to strikers exerts a compound influence on the bargaining positions and strategies of the parties to a labor dispute. It strengthens the strikers who receive it while simultaneously sapping the strength of the employer who pays it. This potent dual effect was found to exist by the District Judge on the basis of evidence emanating largely from unions themselves.

It would lengthen this brief beyond reasonable limits to attempt a summary of all that evidence or of all the findings based on that evidence. Accordingly, our discussion of the facts will be limited to some overall highlights of the record.

Suffice it to say here that when the trial record was closed, any notion that employer-financed unemployment insurance benefits guaranteed to strikers could co-exist with the policy of governmental neutrality in labor disputes was dispelled once and for all.

1. The 1971-1972 CWA Negotiations and Strike.

In June of 1971 the CWA, as national bargaining agent, recommended a nationwide strike against the Bell System which began on July 14. On July 18, the parties reached an agreement in principle and CWA ordered all its members back to work on July 21. Throughout the country all returned except some 38,000 in New York State who insisted on staying out.

A national membership ratification vote was set for August 14, 1971, and both CWA and its top official in

New York State strongly endorsed ratification. The balloting resulted in a resounding ratification of the contract in every CWA bargaining unit across the country with the single exception of the New York State unit for Telco and its wholly-owned subsidiary, Empire City Subway Company (Limited) ("Empire"). Despite nationwide ratification and the International CWA's directive to return to work, the strike was continued in New York where it was to last seven months. Its object was to break the ratified national pattern for New York-based employees of the Bell System.[7] Faced with the determination of its New York locals, CWA subsequently decided to support their illegal strike.[8]

During the first week of September 1971 the strikers became eligible for weekly unemployment compensation in a tax-free amount "adequate or almost adequate to meet essential needs" (Pet. 37a) and, as previously mentioned, benefit payments to the strikers amounted to some $49,000,000 before the strike ended.

The substantial impact of these payments to strikers on the CWA strike and on the collective bargaining of both the union and the struck employers is summarized in the opinion of the District Court (Pet. 26a-32a). Illustrative of this impact was the description at trial by Telco's chief negotiator of how Telco's position during the early months of the strike was premised in large part on the belief that the attempt by CWA's locals in New York to break the national pattern "could only lead to

[7] For a description of pattern bargaining in the Bell System, see Pet. 25a.

[8] The strike was ruled illegal by the National Labor Relations Board in *Communications Wkrs. of America (New York Tel. Co.)*, 208 N.L.R.B. 267 (1973). Pet. 28a.

labor turmoil throughout the Bell System" and, accordingly, should be firmly resisted (A. 313-15). After a number of months had passed, however,

> Telco saw that the strike would not end without some concession to union demands and, noting that employees were still eligible for six or more months of unemployment compensation, decided to settle along the lines recommended by the federal mediator. [Pet. 27a; *see* A. 308-17]

The importance of the expectation and receipt of unemployment compensation to CWA and its striking members was attested by CWA's own statements on the subject. Thus the union threatened Telco at the bargaining table that it would have the union "at your throats for the next 10 years" if the union's suspicions (later shown as unfounded) that Telco was delaying unemployment benefits were confirmed (P. Ex. 161, A. 125; Tr. 36).[9] And, shortly after the strike, the union's strike leader, a Vice President of the International, wrote to the New York CWA-represented employees:

> The fact that more than 80% of the membership stood together for 218 days is simply incredible. In my judgment, it is a testimonial to three phenomena:
>
> 1. Dedication and spirit of the strikers
> 2. Unemployment insurance
> 3. Effectiveness of CWA's defense fund
>
> [P. Ex. 159, A. 119; Tr. 27]

[9] Reference is to an exhibit of plaintiffs in the District Court below, where it appears in the Joint Appendix herein, and the place in the transcript of District Court proceedings where it was offered into evidence.

The extent and nature of the impact of unemployment compensation on collective bargaining and strikes generally cannot be fully appreciated without sampling the flavor of union statements such as the foregoing. The District Court's opinion culled but a few examples[10] from the hundreds placed in evidence. The substance and multitude of CWA's communications to its members bespoke, in most emphatic terms, the fundamental soundness of the findings in this case concerning the impact of unemployment insurance.

In an issue of the "New York Generator," a CWA newspaper, appearing shortly after this suit was filed, reference was made to the suit as an attempt to "sabotage our [union's] strike weapon" (P. Ex. 165, A. 130; Tr. 27).

In November 1971, during the strike, CWA's strike leader in New York wrote to the CWA local presidents that "New York State Unemployment Compensation is a tremendous assist to our members" (P. Ex. 152, A. 111; Tr. 27). The local unions agreed. Thus in April 1973, a recorded telephone message by CWA Local 1103 in Westchester, New York, to its members (but open to anyone wishing to listen) stated:

> If we did not get [unemployment insurance] aid during the big strike of '71 and '72, I don't know where we would be right now. [P. Ex. 36, A. 73; Tr. 19]

Starting before the strike began, CWA promoted maximum resort to unemployment compensation benefits by its members (P. Exs. 86, 128, A. 85, 93; Tr. 19).

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[10] Those emanating from the CWA strike against the Bell Companies are discussed at Pet. 29a-32a; those from other strikes by the CWA as well as other major unions appear at Pet. 32a-33a.

As the date on which eligibility for unemployment compensation approached, various CWA locals alerted their members through recorded telephone messages and personal telephone calls (P. Exs. 38, 79, 82, 93; A. 74, 82, 84, 86; Tr. 19).

Once the benefits became payable, numerous CWA messages reminded the strikers to make claims for unemployment compensation (*e.g.*, P. Ex. 104, A. 89; Tr. 19).

CWA employed the strikers' entitlement to unemployment compensation as a morale booster (P. Exs. 7, 56, 357, A. 77; Tr. 19, 31). It brought local unemployment insurance officials to speak at union meetings concerning sources of public assistance and, in particular, unemployment compensation (P. Ex. 342, A. 217; Tr. 35), used its own facilities as distribution centers for unemployment compensation information and applications (P. Ex. 97, A. 88; Tr. 19), and went to court and administrative agencies when errors were claimed in the administration of unemployment compensation or other public assistance for its members (P. Exs. 114, 122, 142, A. 91, 92, 94; Tr. 19).

Political and other pressures were brought to bear by CWA on public officials where grants of unemployment compensation were challenged, and one of its locals threatened to turn out of office a legislator proposing repeal of the law granting such benefits to strikers (P. Exs. 24, 25, A. 71; Tr. 19).

The union repeatedly expressed its full appreciation of the many purposes to which the unemployment compensation subsidy could be put, and the contrast between resort to that subsidy and resort to welfare, food stamps and the union's own strike fund lent added weight to the impact of the former.

The highest estimate of strikers receiving welfare heard by Telco's chief negotiator, Williams, was 1,000 (A. 309-10). CWA's strike leader in New York thought the actual number applying for welfare might be 1,000 but believed far fewer received such assistance (A. 323). Upwards of 33,000 strikers received unemployment compensation during the strike.

In order to conserve CWA's defense fund it was mandated that no food assistance was to be given out of that fund after September 7, 1971, when unemployment compensation was to start (P. Exs. 147, 144, A. 100, 97; Tr. 27).[11] In contrast to the $49 million paid by the State in employer-financed unemployment compensation, less than $14 million was disbursed by the union's own strike fund (P. Ex. 188; Tr. 27).[12]

2. The Communications of Other Unions.

It should not be supposed that the record was confined to expressions by the CWA concerning the importance and impact of unemployment compensation during the 1971-1972 strike against the Bell Companies. Numerous statements of kindred import were made in other strikes by

[11] The increasing resort by unions to government-granted benefits, including unemployment compensation to striking employees, in lieu of the unions' own strike funds, was recognized by the then Director of the Federal Mediation and Conciliation Service, J. Curtis Counts, when he stated:

> I believe that it is valid to conclude that these measures changed appreciably the economic pressures attached to the strike. Certainly, the nature of strike benefits was changed from one of union-employee responsibility to one of government assisted responsibility. [P. Ex. 366, A. 228; Tr. 237]

See also, P. Exs. 236, 242, 246, 261, A. 149, 162, 165; Tr. 50, 40, 51.

[12] A sampling of CWA communications has been reproduced at A. 68-130, 133-36, 178-86, 208-11, 226-27, 230.

other major unions such as the United Steelworkers of America (P. Exs. 234-A, 236, 259, 325, A. 147, 149, 203; Tr. 40, 50), the International Brotherhood of Electrical Workers (P. Exs. 251, 252, 322, 337, 339, A. 166, 168, 201, 212, 214; Tr. 31, 40), the Oil, Chemical and Atomic Workers International Union (P. Ex. 323; Tr. 40), and the United Automobile Workers (P. Ex. 353, A. 223; Tr. 40).

One of several examples cited in the District Court's opinion (Pet. 32a-33a) involved a nationwide strike by the International Union of Electrical Workers against the General Electric Company in 1969-1970. In a union meeting in Cleveland, Ohio, at the taking of a vote to end the strike, the union official chairing the meeting stated as follows:

> All I know is that Schenectady [New York] voted today 5 to 3 to stay out and you know the reason why. . . .
>
> Because they're getting $65 a week in unemployment compensation. [P. Ex. 172, A. 131; Tr. 40, a transcription of P. Ex. 169][13]

3. The Experts.

The District Court found further support for its conclusions on impact in the testimony of experts called by the Bell Companies (pursuant to the suggestion made in the opinion in *Grinnell Corp.* v. *Hackett,* 475 F.2d 449, 459 (1st Cir.), *cert. denied,* 414 U.S. 858, 879 (1973)), and in statistical and empirical studies offered by them (Pet. 33a-38a). These experts are all leaders of their professions and were authoritative, believed and deserved to be believed. Their eminent and impressive qualifications were

[13] In connection with the same strike, *see also,* P. Ex. 241, A. 161; Tr. 50, quoted in full by the District Court at Pet. 33a.

set forth at length during the trial (Tr. 398-406 [Glasser]; Tr. 1234-37 [Perl]; Tr. 240-43 [Backman].

The trial judge's findings concerning Dr. Jules Backman were:

> Dr. Jules Backman, an acknowledged expert in the field of collective bargaining, [was called by plaintiffs] to give an overview. Backman . . . saw the availability and payment of unemployment insurance benefits as affecting the duration of strikes in opposite directions. Under some circumstances, he felt, the awareness that the staying power of the union would be increased, while at the same time anticipating a rise in their unemployment insurance tax, would induce some employers to settle earlier, out of concern for what may happen after the eight week suspension period. Thus, he concluded, unemployment insurance could increase somewhat the incidence of earlier settlements. However, as the strike passed the eighth week, he saw the position becoming "dramatically one-sided," for (1) the employee comes into receipt of funds adequate or almost adequate to meet essential needs, thereby increasing staying power, (2) the union's willingness to make concessions is reduced because one of its duties, providing resources to meet the needs of strikers, has been met and will continue to be met for as much as a year, and (3) the employer, on the other hand, sees his striking employee being subsidized while he, the employer, is in effect financing the subsidy out of his unemployment insurance taxes. [Pet. 37a][14]

According to Dr. Backman, unemployment compensation provides an important, tax-free resource to strikers, approximately equal to the irreducible expenses of the average worker for food, shelter, and other necessities

[14] *See* A. 328-35, 340-41. This analysis was corroborated by testimony of Dr. Lewis J. Perl (Pet. 34a-36a), as well as by the State's witnesses Kuhn (A. 453-54, 466), and Haire (A. 375-86).

(A. 329-34). In his opinion, when a strike approaches the eighth week in New York, "the ability of strikers to hold out is significantly increased" and the ability of their union to stand firm on its bargaining demands "is changed very dramatically when these funds [unemployment compensation] become available" (A. 333-34).

The District Court saw in the testimony of Dr. Lewis J. Perl additional support for its findings. Dr. Perl had conducted a statistical comparison using the United States Bureau of Labor Statistics figures for the ten year period from 1965 through 1974 to test the hypothesis that the payment of unemployment compensation to strikers influences collective bargaining by increasing the *number* of strikes settled within eight weeks and the *duration* of strikes that continued beyond that period (Pet. 34a-35a). As the trial judge noted (Pet. 36a), "Perl's hypothesis was indeed supported."

> Perl's analysis of the Department of Labor statistics reveals that strikes of more than eight weeks last two to four weeks longer in New York State than in states other than New York and Rhode Island, while a greater percentage of strikes are settled in eight weeks or less in New York than in states other than New York and Rhode Island. Applying the settlement rate for the rest of the country to New York State, Perl concluded that 933,000 fewer man-days would be lost in New York each year were the national settlement rate to prevail here, which would constitute a 15% reduction in man-days lost due to strikes in New York. [Footnote omitted]

Dr. Gerald J. Glasser presented the results of an attitudinal survey which the District Court termed "professionally done . . . [and] indeed helpful" (Pet. 34a). The attitudes of groups of employees are significant, Dr.

Glasser testified, because they influence both labor leaders and management (Pet. 34a). As the District Court observed (Pet. 34a):

> The results [of Dr. Glasser's survey] showed a predominant feeling among both union and non-union workers that because of unemployment insurance in New York State unions can achieve better strike settlements, since unemployment insurance enables strikers to hold out longer. Less predominant, but still shared by one-half of the union and non-union workers who expressed an opinion, was the strong belief that unemployment insurance forced management to settle more quickly. A majority of the union members surveyed ranked *unemployment compensation* as the *first* resource they would turn to in a strike, *above welfare, food stamps and their union's own strike funds.* [Emphasis supplied; *see* P. Exs. 376-86, A. 235-45; Tr. 422]

The State unsuccessfully attempted to dispute the impressive body of expert opinion and professionally conducted statistical and attitudinal studies by calling several expert witnesses of its own. The District Court, after hearing and examining the State's experts, evaluated them as follows (Pet. 37a-38a):

> Often, in the course of their testimony . . . they ended up supporting plaintiffs' position. To the extent their testimony was in real or apparent conflict, *I reject it.* [Emphasis supplied; footnote omitted]

Indeed, the State itself has recognized and quantified some aspects of the impact of unemployment insurance to strikers in New York in its publication, "The Industrial Controversy Provision of the New York State Unemployment Insurance Law 1935-1973" (P. Ex. 345, A. 218; Tr. 72):

> About 9.3 percent of all work stoppages during the 26 years from 1947 to 1972 lasted longer than eight weeks. These stoppages involved 13.8 percent of all workers unemployed because of a strike in their establishment and 51.0 percent of mandays made idle. A total of 1,240 stoppages involving approximately 724,612 workers and 43,524,000 mandays idle fall into this category.

4. The State's Reasons for Providing Unemployment Compensation to Strikers.

New York State, as found by the District Court, possesses no cognizable interest which it can convincingly urge as condoning its intrusion into a federally guarded area (Pet. 38a).

Two witnesses called by the State at the trial bore this out (Pet. 38a-42a). The legislative draftsman (Dr. Herman Gray), whom the State produced as a co-author of New York's original Unemployment Insurance Law, testified in effect that the provision granting benefits to strikers was really a compromise reached primarily for administrative convenience (Pet. 39a; A. 363-65), *i.e.*, to avoid the necessity for the administering agency to determine who were strikers and who were simply refusing to cross a picket line out of fear or as a matter of principle. The compromise was that *all* who lost employment due to a labor dispute at their establishment (whether engaged in the strike or not) would be disqualified for a fixed waiting period, and then after serving the waiting period *all* would receive benefits. As found by the District Court, the avowed purpose of the law (*i.e.*, to benefit those who are *involuntarily* unemployed) thereby was "subverted for the purpose of mere administrative convenience" (Pet. 39a). Dr. Gray regretted this result later when, as Chairman of the New York State Unemployment Insurance Advisory Council,

he saw the extent and impact of the payments made to strikers. He therefore recommended in 1946 that benefits no longer be paid to strikers, since their payment runs "counter to the objective of the law" which is designed to benefit "persons unemployed through no fault of their own" (Pet. 39a-40a).

The State's second witness on this subject (Harold Kasper, Director of New York State's Unemployment Insurance Division) (Pet. 40a-42a) corroborated the conclusion that the claim of "administrative *inability*" to make distinctions between strikers and non-strikers, offered as justification for New York's law, amounted to no more than a desire to serve "administrative *convenience*" (emphasis court's; Pet. 41a). Moreover, recognizing an obligation on the State's part to maintain neutrality during labor disputes, Kasper claimed that this statute achieved that purpose by virtue of the waiting period. He himself, however, recognized that this was but a temporary neutrality predestined to end at a fixed time, which is in sight from the day the strike starts (A. 404). For, as found by the District Court, Kasper conceded that after eight weeks the "State intervenes to aid strikers through benefit payments chargeable against their struck employer" (Pet. 41a; footnote omitted).

Summary of Argument

In the National Labor Relations Act, Congress has structured a system of collective bargaining, free from government interference and intervention, which leaves "the results of the contest to the bargaining strengths of the parties." *H.K. Porter Co.* v. *NLRB,* 397 U.S. 99, 108 (1970).

The use of economic force is "part and parcel of the process" and the "economic weakness of . . . [either] party cannot justify state aid." *Lodge 76, IAM* v. *Wisconsin Employment Rel. Comm'n,* 427 U.S. 132, 149 (1976). Collective bargaining as so envisioned under the NLRA "does not entail any 'right' to insist on one's position free from economic disadvantage." *American Ship Bldg. Co.* v. *NLRB,* 380 U.S. 300, 309 (1965).

Congress' policy mandating government neutrality in the collective bargaining area is fundamental to the federal scheme. This Court has been vigilant in protecting against state incursions into areas, such as this, intended by Congress to be left for "'the free play of economic forces.'" *Lodge 76, IAM,* 427 U.S. at 140. State laws which have a tendency to frustrate the policy of neutrality, or which create a substantial risk of conflict therewith, are consistently invalidated under the labor preemption doctrine.

The existence of open, direct and substantial conflict between the federal policy of neutrality and New York State's statute compelling payment of employer-financed unemployment compensation to striking employees was definitively and compellingly proved and found below. The view that congressional history (consisting largely of what Congress did *not* do and did *not* say) somehow requires an inference of congressional tolerance of this proven conflict is untenable.

The New York law, under well-established preemption principles, must be invalidated insofar as it mandates employer-financed payments of unemployment compensation benefits to strikers.

ARGUMENT

I

New York State's Statute Granting Employer-Financed Unemployment Compensation to Strikers Is in Direct and Substantial Conflict With National Labor Policy. It Was Correctly Held Unconstitutional by the District Court on a Record Which Demonstrated and Documented That Conflict.

A. *National Labor Policy Is Preemptive and Supreme. Collective Bargaining Free From Government Interference Is Central to the Uniform Federal Scheme.*

Congress has regulated and occupied the area of labor relations "to the full extent of its constitutional power under the Commerce Clause," *Street, Elec. Ry. & Motor Coach Employees* v. *Wisconsin Employment Rel. Bd.*, 340 U.S. 383, 391 (1951), and, accordingly, no state may enter into this area by legislation or other means which have a "tendency to frustrate" the operation of the federal labor scheme, *Nash* v. *Florida Indus. Comm'n*, 389 U.S. 235, 239 (1967), *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468 (1955), or which "creates a substantial risk of conflict with policies central to the federal labor law," *Connell Constr. Co.* v. *Plumbers Local 100*, 421 U.S. 616, 636 (1975).

This Court has repeatedly recognized that the national policy promoting collective bargaining free from government interference is of just such central significance. *See, e.g., H.K. Porter Co.* v. *NLRB*, 397 U.S. 99, 108 (1970); *Street, Elec. Ry. & Motor Coach Employees, Div. 1287* v. *Missouri*, 374 U.S. 74, 82 (1963); *NLRB* v. *American*

Nat'l Ins. Co., 343 U.S. 395, 401-03 (1952); *Teamsters Local 24* v. *Oliver*, 358 U.S. 283, 295 (1959). Thus, any state law which "stands as an obstacle to the accomplishment of the full purpose and objectives of Congress" in creating this policy, as does the New York law at issue in this case, must be declared invalid and nullified under the Supremacy Clause[15] of the United States Constitution. *Hill* v. *Florida*, 325 U.S. 538, 542 (1945).

Free collective bargaining, as insured by the federal labor policy, is premised on the concept of government noninterference and neutrality. While the government "acts to oversee and referee the process of collective bargaining," it leaves "the results of the contest to the bargaining strengths of the parties." *H.K. Porter*, 397 U.S. at 108. Indeed, the right to bargain collectively clearly contemplates economic warfare and "does not entail any 'right' to insist on one's position free from economic disadvantage." *American Ship Bldg. Co.* v. *NLRB*, 380 U.S. 300, 309 (1965). As a practical matter, it is the use of economic force or its availability in reserve that acts as the prime motive or catalyst under the federal scheme for reaching agreements in collective bargaining. *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 489 (1960); *Lodge 76, IAM* v. *Wisconsin Employment Rel. Comm'n*, 427 U.S. 132, 149 (1976). Each of the negotiating parties is left to his respective resources, with each party expected to absorb the natural consequences of his own economic actions. *American Ship Bldg.*, 380 U.S. at 309, 313. The "economic weakness of . . . [either] party cannot justify state aid." *Lodge 76, IAM*, 427 U.S. at 149.

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[15] Quoted at p. 2, *supra*.

Congress' policy mandating government neutrality in collective bargaining and labor disputes has been uniformly and consistently applied against all government interference unauthorized by Congress without regard to its source. Not even the National Labor Relations Board, created by Congress to implement its labor policy, may depart from this policy. *H.K. Porter,* 397 U.S. 99. It falls within one of the most zealously guarded areas of federal supremacy.

B. *New York's Grant of Employer-Financed Unemployment Compensation to Strikers Frustrates the Accomplishment of the Purposes of the National Labor Policy Guaranteeing Free Collective Bargaining.*

The congressionally prescribed governmental abstention from altering the economic balance of power between parties to collective bargaining requires that state legislation which operates to alter the relative bargaining strengths of the parties, either by financial subsidy or otherwise, be federally preempted. States are forbidden, this Court stated, to "upset the balance of power between labor and management expressed in our national labor policy." *Teamsters Local 20* v. *Morton,* 377 U.S. 252, 259-60 (1964); *Lodge 76, IAM,* 427 U.S. at 146-47.

The District Court in this case correctly applied these well-established principles of labor law preemption in finding that the New York Unemployment Insurance Law, insofar as it grants unemployment compensation to strikers, (a) constitutes state intervention on their behalf, (b) tips the economic scales in their favor and (c) forces New York employers to subsidize lengthy strikes against themselves, all in conflict with the preemptive national labor policy of governmental neutrality in labor disputes and collective

bargaining. (Pet. 54a, 45a, 28a). It accordingly declared the statute, to the extent it subsidizes strikers, invalid under the Supremacy Clause (Pet. 20a, 54a).[16]

The Court of Appeals implicitly accepted the District Court's findings on this subject and expressly recognized the head-on conflict with the federal scheme. It nevertheless concluded that the national labor policy must give way since

> the conflict between New York's statute and the broad federal policy of free collective bargaining . . . is one which Congress has decided to tolerate. [Pet. 17a]

If permitted to stand, this decision would sanction the continuation of a proven and substantial state interference with federal labor policy. It opens the way to fifty separate and disparate state determinations concerning the extent and amount of state-granted, but employer-financed, subsidies to strikers, regardless of their adverse impact on free collective bargaining and on the balance struck by Congress in the federal labor laws.

In *Lodge 76, IAM,* this Court recognized that "Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining and labor disputes." 427 U.S. at 140 n. 4, quoting Cox, *Labor Law Preemption Revisited,* 85 Harv.L.Rev. 1337, 1352 (1972). That decision reaffirmed this Court's intent to

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[16] A similar decision was reached concerning Hawaii's law granting unemployment compensation to strikers in *Hawaiian Tel. Co.* v. *Hawaii Dep't of Labor & Indus. Rel.,* 405 F. Supp. 275 (D. Hawaii 1975), *appeals docketed* (9th Cir. Mar. 19 and May 22, 1976) (Nos. 76-1584, 76-2056), *cert. prior to circuit court decision denied,* 46 U.S.L.W. 3599 (U.S. Mar. 27, 1978) (No. 77-962).

guard the national labor policy against any state attempt to make dominant its own standards of properly balanced bargaining power or to enforce its own notions concerning the accommodation of the special interests of strikers, their unions and employers, and the public in collective bargaining and labor disputes. *Lodge 76, IAM,* 427 U.S. at 149-51. Expressly prohibited by this Court under its rationale in *Lodge 76, IAM* is any state intrusion into areas intended by Congress to be unregulated because left for " 'the free play of economic forces.' *NLRB* v. *Nash-Finch Co.,* 404 U.S. 138, 144 (1971)." *Id.* at 140.[17]

New York's law cannot survive scrutiny under these governing preemption principles. The direct financial subsidy[18] granted under that law provides the union with a strike weapon and its striking membership with the financial means to resist settlement and a return to work before their demands are met at the bargaining table. These substantial weekly tax-free payments to a striker, the District Court found, are a "substantial factor affecting his will-

[17] This analysis was earlier applied by this Court in *Morton,* 377 U.S. 252. It should be distinguished from the *Garmon* line of preemption analysis which has its genesis in *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236 (1959), and was most recently applied in *Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters,* 46 U.S.L.W. 4446 (U.S. May 15, 1978) (No. 76-750) and *Farmer* v. *Carpenters Local 25,* 430 U.S. 290 (1977). The *Garmon* analysis focuses on the primary jurisdiction of the National Labor Relations Board under the NLRA—not on the matter of governmental aid to one party to an economic dispute at the expense of the other.

[18] The maximum amount, as earlier stated, is $115 tax free, to be increased in September 1978 to $125. The maximum at the time of the Telco strike was $75 and this, as found below on the basis of expert testimony, was sufficient to meet the essential needs of the strikers during the 1971-1972 strike in this case, thereby increasing their staying power.

ingness to go on strike or, once on strike, to remain on strike" (Pet. 28a).[19]

The employer, on the other hand, not only sees his striking employees being subsidized, but is aware that he, the employer, is financing the subsidy out of his unemployment insurance taxes (Pet. 37a). Management negotiators—like their union counterparts—are clearly impressed by the fact that, under the unemployment insurance taxing scheme, the payment of benefits to strikers will deplete the employer's experience-rating account in the Unemployment Insurance Fund with the inevitable result of higher un-

[19] The District Court made mention in a footnote appearing at this point in its opinion that, "even as to welfare payments, for which one must make a showing of 'need,' " Justice Blackmun, in *Super Tire Eng'r Co.* v. *McCorkle,* 416 U.S. 115, 124 (1974), stated:

> It cannot be doubted that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every existing collective-bargaining agreement, and is a factor lurking in the background of every incipient labor contract.

Welfare payments, of course, stand on a different footing from unemployment compensation, with the former available only to strikers who make the required showing of need and the latter available in New York to all strikers as of right without regard to need. Unemployment compensation therefore exerts a greater financial impact on strikes. For example, in the Telco strike 49 million dollars were funnelled into the pockets of 33,000 strikers through unemployment compensation while not more than 1,000 strikers received welfare benefits. In addition, since welfare is financed by the public treasury, its impact on collective bargaining and strikes is far more indirect and remote than unemployment compensation which *is financed from the pockets of the struck employer.* For a discussion of the differing state interests in the payment of these benefits and of the reasons why cases dealing with welfare payments to strikers are not controlling in the unemployment compensation area, *see Grinnell,* 475 F.2d at 459-60; *ITT Lamp Div.* v. *Minter,* 435 F.2d 989, 994-95 (1st Cir. 1970), *cert. denied,* 402 U.S. 933 (1971); and the District Court's opinion herein (Pet. 46a-47a).

employment insurance tax rates in the future.[20] This circumstance may cause management to accede to union demands prior to the end of the strikers' eight-week waiting period or, where strikers are actually collecting benefits, it may act as a continuing financial pressure point on the employer who knows that his experience-rating account is being depleted.

This state intrusion into an area Congress left to the "free play of economic forces",[21] is, as previously mentioned, expressly forbidden under this Court's rationale in *Lodge 76, IAM.* It "frustrates" the national labor policy mandating that "the balance of bargaining advantage . . . be set by economic power realities,"[22] and thereby runs afoul of the preemption principles applied by this Court in cases such as *Nash,* 389 U.S. 235; *Hill,* 325 U.S. 538; and *Connell,* 421 U.S. 616. The notion that Congress intended to "tolerate" optional state-by-state frustration of its labor policy is, we submit, untenable. In our later discussion

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[20] The amount of benefits paid out of the employer's account along with the contributions paid in by him in any single year determines his individual tax rate for the following year. As a result of the 49 million dollars paid to strikers in 1971 and 1972, Telco's tax rate went from one of the lowest possible rates before the strike to the highest, resulting in additional unemployment tax payments of approximately $6.5 million in 1972 and $9.3 million in 1973 in excess of those that would have been due and payable had no benefits been paid to strikers. PTO ¶35f, A. 60. Telco has estimated that it has made excess payments exceeding $37 million through 1977 and they continue. In short, the experience rating provisions of the New York law act as a conduit to move funds from the struck employer to the strikers. It should be noted that the NLRB has ruled that an employer may not be required "to subsidize the strike" against himself. *See, e.g., Southwestern Elec. Power Co.,* 216 N.L.R.B. 522 (1975).

[21] 427 U.S. at 140, quoting *Nash-Finch,* 404 U.S. at 144.

[22] *NLRB* v. *Burns Security Servs., Inc.,* 406 U.S. 272, 288 (1972).

(Point II, *infra*) of the patchwork of legislative history which has been summoned up to support this notion, we shall show that it provides no legal shelter for New York's offending statute.

C. *Other Unemployment Compensation Cases: Hawaiian Telco and Nash.*

The preemption issue posed in this case was the subject of a decision reached after a plenary trial in another federal case involving the payment of unemployment compensation to strikers. *Hawaiian Tel. Co.* v. *Hawaii Dep't of Labor & Indus. Rel.,* 405 F. Supp. 275 (D. Hawaii 1975), *appeals docketed* (9th Cir. Mar. 19 and May 22, 1976) (Nos. 76-1584, 76-2056), *cert. prior to circuit court decision denied,* 46 U.S.L.W. 3599 (U.S. Mar. 27, 1978) (No. 77-962). Under Hawaii's law, strikers were entitled to unemployment benefits where their employer was able to continue operating his business in substantial part (about 80%) during a strike. The district court there, after finding that the Hawaiian law exerted a substantial impact on collective bargaining and strikes (405 F. Supp. at 282), concluded that the law (1) does not implement any "necessary 'state purposes,'" (2) "irreconcilably intrudes into the federal process of free collective bargaining," and (3) frustrates Congress' scheme that that process be free from state interference. *Id. at* 290.

Moreover, *Hawaiian Telco* is not the first case in which state eligibility requirements for unemployment compensation have been struck down because they were preempted by the federal labor policy. In *Nash* v. *Florida Indus. Comm'n,* 389 U.S. 235 (1967), this Court found a violation of the Supremacy Clause in the labor dispute provision of

the Florida Unemployment Compensation Law insofar as it denied benefits to a claimant because she filed an unfair labor practice charge with the NLRB. The Court concluded that Florida's eligibility requirements in this regard "frustrated" the purposes of the national labor legislation and stood as an "obstacle" to their full accomplishment.

As the National Labor Relations Board stated to this Court as an *amicus curiae* in *Nash* (Brief p. 7):

> Within broad limits [a state] is unquestionably free to prescribe the conditions upon which employees are entitled to receive the benefits of the State's unemployment compensation system. Nevertheless, a "state may not so deal with matters left to its control as to stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" • • • Thus, this Court has frequently set aside State regulatory schemes found to impair rights created by the National Labor Relations Act. See *Hill* v. *Florida,* 325 U.S. 538; *Auto Workers* v. *O'Brien,* 339 U.S. 454; *cf. San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236. And the conditions that a State may impose upon a grant of benefits are likewise subject to scrutiny to insure consistency with federal policy. It is quite clear a State cannot condition the grant of benefits in a manner that undermines rights protected by the Constitution or frustrates federal legislation.

The *Hawaiian Telco* decision and the principle laid down in this Court's decision in *Nash,* stand foursquare against the single underlying premise of the Court of Appeals' opinion below, namely, that each state enjoys the right to establish such eligibility requirements for unemployment compensation to strikers as it may wish, without regard to

the federal labor policy. This Court's observation in *Nash,* we submit, is applicable here:

> A national system for the implementation of this country's labor policy is not so dependent on state law. 389 U.S. at 239.[23]

D. *None of the Court-Recognized Exceptions to the Preemption Doctrine Is Applicable Here.*

The New York statute does not fit into any of the exceptions to the preemption doctrine which have been permitted in labor cases. These exceptions have been limited by this Court essentially to cases where (1) the activity regulated by the state was "a merely peripheral concern" of the federal labor laws, *Garmon,* 359 U.S. at 243-44; *Lodge 76, IAM,* 427 U.S. at 136-37, (2) it "touched interests so deeply rooted in local feeling and responsibility that . . . [a court] could not infer that Congress had deprived the States of the power to act," *id.,* or (3) Congress has "affirmatively indicated" that the states have the power to act, *Street, Elec. Ry. & Motor Coach Employees* v. *Lockridge,* 403 U.S.

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[23] As previously noted, there are few areas of federal law, if any, which have been vouchsafed the degree of judicial protection from state interference as labor-management relations. With but few exceptions, both federal and state courts have uniformly declared preempted and invalidated state action wherever it could be shown that it had a significant effect, whether direct or indirect, upon the parties in collective bargaining or in a labor dispute. *See e.g., Lodge 76, IAM,* 427 U.S. 132; *Weber,* 348 U.S. 468; *Teamsters Local 24* v. *Oliver,* 358 U.S. 283 (1959); *UAW* v. *O'Brien,* 339 U.S. 454 (1950); *General Elec. Co.* v. *Callahan,* 294 F.2d 60 (1st Cir. 1961), *cert. dismissed,* 369 U.S. 832 (1962); *Oil, Chem. & Atomic Workers* v. *Arkansas Louisiana Gas Co.,* 332 F.2d 64 (10th Cir. 1964); *Grand Rapids City Coach Lines* v. *Howlett,* 137 F. Supp. 667 (W.D. Mich. 1955); *Delaware Coach Co.* v. *Public Serv. Comm'n,* 265 F. Supp. 648 (D. Del. 1967); *Rochester Tel. Corp.* v. *Levine,* 90 L.R.R.M. 3032 (W.D.N.Y. 1975); *John Hancock Mut. Life Ins. Co.* v. *Commissioner of Ins.,* 349 Mass. 390, 208 N.E.2d 516, 524-25 (1965).

274, 297 (1971); *Malone* v. *White Motor Co.*, 46 U.S.L.W. 4295 (U.S. Apr. 3, 1978) (No. 76-1184).[24]

None of these exceptions has been invoked in this case, save the last, and, with respect to it, the Court of Appeals' decision below, as shall be discussed more fully in Point II of this brief, is manifestly in error. The impact of the New York law on free collective bargaining is not peripheral in nature, stemming incidentally from a non-labor law of general application. It is, on the contrary, both direct and substantial, stemming from a provision of state law expressly dealing with benefits for strikers in labor disputes, which confronts the federal policy with New York's own and conflicting concept of supposed government "neutrality."

Nor can it be said that New York has an overriding or compelling state interest which, in itself, requires the obstruction of federal policy here found to be tolerated. No such interest was found under the Hawaiian law by the district court in *Hawaiian Telco,* 405 F. Supp. at 290, 289 n.71. And none was found nor exists here (Pet. 42a, 47a). As earlier stated, New York's law was the product of compromise reached for the purpose of mere administrative convenience (pp. 17-18, *supra*). Indeed the District Court noted that the avowed purpose of the New York Unemploy-

[24] Two other exceptions to the preemption doctrine, neither of which applies here, have been applied in *Garmon*-type primary jurisdiction cases. These relate to cases " 'where the particular rule of law sought to be invoked before another tribunal is so structured and administered that in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes,' " *Sears,* 46 U.S.L.W. at 4449 n.13, quoting from *Farmer,* 430 U.S. at 296-97, and where the "state court can ascertain the actual legal significance of particular conduct under federal law by reference to 'compelling precedent applied to essentially undisputed facts,' " *Sears,* 46 U.S.L.W. at 4449 n.13, quoting from *Garmon,* 359 U.S. at 246.

ment Insurance Law (as stated in § 501 of the New York Labor Law) "was subverted" to achieve that purpose (Pet. 39a). Thus, in 1946, the Chairman of the New York State Unemployment Insurance Advisory Council, who was one of the drafters of the New York law,[25] recommended that benefits no longer be paid to strikers because:

> The present provision of the law which permits the workers who voluntarily become unemployed because of a strike to receive benefits during the pendency of the strike runs counter to the objective of the law which "compels our setting aside of financial reserves for the benefit of persons unemployed through no fault of their own." [Pet. 39a-40a; *see* A. 368-71]

Not only is there no state interest existing in this case which merits balancing against the federal interest, but, as the District Court found, no such balancing is called for at all. Pet. 47a n.21; *accord, Hawaiian Telco,* 405 F. Supp. at 284 n.56. For once such a direct and substantial interference with a policy as central to the federal labor laws as the one here involved is found, no state interest, however compelling, can legitimize that interference. To hold otherwise, in the words of this Court, would be an "aberrational doctrine." *Perez* v. *Campbell,* 402 U.S. 637, 651 (1971). Neither the fact that a state has acted "through laws of broad general application rather than laws specifically directed towards the governance of industrial relations," *Garmon,* 359 U.S. at 244, nor the "relative importance to the State of its own law is . . . material," *Free* v. *Bland,* 369 U.S. 663, 666 (1962).[26]

[25] As earlier noted, Dr. Gray was called as a witness by the State in this case.

[26] For example, state "emergency legislation" enacted "to protect the public from threatened breakdowns in vital community services," was declared preempted by this Court in *Street, Elec. Ry. & Motor*

The District Court disposed of this subject in its conclusion that "even if such a [balancing] test were required, I would hold the federal interest superior to the state interest herein, which is at best one of administrative convenience" (Pet. 47a n.21).[27]

We proceed to a discussion of the congressional history and of the error committed by the Court of Appeals below in sweeping aside the conflict proved in this case and validating New York's out-and-out invasion of a federally forbidden province.

Coach Employees v. *Missouri*, 373 U.S. at 80-81. It might be noted that in a recent *Garmon*-type case, where the risk of conflict between state and federal law was not as obvious, substantial or certain as in the case at bar, the Court did apply some balancing of state and federal interests. *Sears*, 46 U.S.L.W. 4446.

[27] The State's alternate explanation for its law (maintaining neutrality for eight weeks and, thereafter, intervening to pay benefits in aid of the strikers so they may meet their essential expenses) is, we submit, not only inferior to the federal interest but in direct and substantial conflict with it.

II

Congress Never Authorized Obstruction of Its National Labor Policy Through State Unemployment Compensation Laws Subsidizing Strikers. The Court of Appeals Erred in Inferring Congressional Tolerance of the Proven Conflict Between Such State Laws and the National Policy of Government Neutrality in Collective Bargaining.

The Court of Appeals acknowledged the absence of any "positive expression of congressional intent" [28] on the subject of unemployment compensation for strikers and thereupon proceeded to infer one. The intent it so imputed to Congress was drawn from a patchwork of events, many unconnected, none clear-cut or bearing authentication by Congress as a body and some pointing in opposite directions from each other.

The Court of Appeals' finding of congressional tolerance for state grants of employer-financed unemployment benefits to strikers was founded on the twin beliefs that Congress wished to leave this subject "in the hands of local officials" and that the "national interest can be served as well by individual State experimentation as by enforced national uniformity" (Pet. 15a).

This conclusion was in direct conflict with the well-established federal rule of governmental neutrality in labor disputes and turned upside down the long-standing presumption in favor of federal preemption of state laws which presume to accommodate the special interests of the

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[28] Pet. 7a.

parties to such disputes. The Court of Appeals based this extraordinary grant of superseding state power on the fallacy that, because Congress did not *in haec verba* deny the power, it could be inferred from a combination of silence and inaction.

But the powerful labor preemption doctrine cannot so easily be swept aside. Certainly more than congressional silence is necessary to condone state intrusion, at will, into an area this Court has found central to the national labor policy. *Lodge 76, IAM,* 427 U.S. at 149-51.

The presumption in favor of federal preemption, ignored by the court below, has been explained by Professor Cox in these words:

> Where the state law or rule of decision is based upon an accommodation of the special interests of employers, unions, employees, or the public in employee self-organization, collective bargaining or labor disputes . . . the likelihood that its application . . . will upset the balance struck by Congress is so great as *to require exclusion of state law unless Congress has provided otherwise.* [Cox, *Labor Law Preemption Revisited,* 85 Harv. L. Rev. 1337, 1356 (1972); emphasis supplied]

This Court, moreover, has observed that this exception should be applied in situations where Congress has *"affirmatively indicated"* that the states have the power to act. *Lockridge,* 403 U.S. at 297; emphasis supplied.[29]

[29] In its recent decision in *Malone* v. *White Motor Corp.,* 46 U.S.L.W. 4295 (U.S. Apr. 3, 1978) (No. 76-1184), this Court applied this exception to a case involving the issue of whether state laws on subjects of mandatory bargaining, as defined by federal law, are subject to preemption. There the Court refused to apply preemption because Congress had affirmatively and clearly indicated in the provisions of the Welfare and Pension Plans Disclosure Act, and in the surrounding legislative history of that 1958 Act, that it wished to preserve state authority to regulate pension plans. The affirmative statutory expression found there and absent here is one of the important distinguishing features of that case from the one at bar. Yet even this affirmative indication was considered by all three dissenting Justices as insufficient to override the national labor policy barring "interference by the State with privately negotiated solutions to problems involving mandatory subjects of collective bargaining." 46 U.S.L.W. at 4300. Evidence as to "what Congress did *not* do" in the 1958 Act was rejected by the dissenters as a proper basis for inferring a positive congressional intent. *Id.* In a separate dissenting opinion, Mr. Justice Powell, with whom Mr. Chief Justice Burger joined, refused to infer Congress' toleration of the conflict between the state and federal law involved in *Malone* "[i]n the absence of congressional indication to the contrary." "Until Congress expresses its will in clearer fashion than in the ambiguous pre-emption disclaimer of the 1958 Disclosure Act, . . . federal labor policy requires invalidation of the type of statute involved in this case." *Id.* at 4300-01.

To ignore this presumption, as the court did below, is particularly destructive of the federal labor scheme in the circumstances of this case, where the state law not merely threatens to disrupt Congress' "equitably and delicately structur[ed] . . . balance of power,"[30] but also creates a proven conflict of substantial proportions with the preemptive policy which created that balance.

Legislative silence, it has been recognized, is a "'poor beacon' to follow in construing a statute," 2A Sutherland, *Statutory Construction,* §49.10 at p. 261 (4th ed. 1973), and Congress' inaction "affords the most dubious foundation for drawing positive inferences," *United States* v. *Price,* 361 U.S. 304, 310-13 (1960). Indeed, "courts are properly chary of equating mere inaction with approval, in the absence of solid foundation for the inference of conscious ratification." *Duncan* v. *Railroad Retirement Bd.,* 375 F.2d 915, 919 (4th Cir. 1967).

[30] *Lockridge,* 403 U.S. at 286.

This Court, moreover, has cautioned that the proponent of decisions such as that below, which proceed on the basis of a limitation on the scope of established federal policy, "bears a heavy burden of persuasion," *Amell* v. *United States,* 384 U.S. 158, 165-66 (1966), and cannot succeed unless legislative intent that is "clear and manifest" is demonstrated, *United States* v. *Borden Co.,* 308 U.S. 188, 198 (1939). For it is a "cardinal principle of statutory construction" that altering or narrowing the scope of an enactment by implication is "not favored," *United States* v. *United Continental Tuna Corp.,* 425 U.S. 164, 168-69 (1976). Courts must be "hesitant to infer from . . . [congressional] silence" a result which "while serving one legislative purpose will disserve" another. *Santa Clara Pueblo* v. *Martinez,* 46 U.S.L.W. 4412, 4416 (U.S. May 15, 1978) (No. 76-682).

It was in disregard of these established rules of construction, that the court below erroneously sanctioned open and substantial interference with Congress' uniform national labor policy through state unemployment compensation laws subsidizing strikers. In doing so that court was in express disagreement and conflict with the decisions of all "[t]hose courts that have considered Congress' intent with respect to the payment of unemployment benefits to strikers" (Pet. 7a).[31]

After an in-depth review and analysis of congressional intent and the very same legislative history on the subject of unemployment compensation for strikers as here con-

[31] Since the Second Circuit made this observation, a federal district court in Illinois cited with approval the reasoning and conclusion of its opinion in this case. *Olin Corp.* v. *Illinois Dep't of Labor,* 443 F. Supp. 366 (S.D. Ill. 1978).

sidered, the Court of Appeals for the First Circuit, in *Grinnell,* concluded that:

> the existing legislative record is not sufficiently clear to establish Congressional intent either way . . . . [475 F.2d at 454]
>
> The *most* that can fairly be said, in the face of this legislative record, is that Congress has been and presently is aware[32] of the problem, has had the opportunity to resolve it, and has acted in closely analogous circumstances.
>
> [*U*]*nambiguous Congressional intent is lacking* . . . . [*Id.* at 457; emphasis supplied][33]

The federal district court in *Hawaiian Telco* arrived at the same conclusion: "this court agrees with *Grinnell* . . . that 'unambigous Congressional intent is lacking.'" 405 F. Supp. at 286. And so did the district court in *Dow Chem. Co.* v. *Taylor,* 57 F.R.D. 105, 108 (E.D. Mich. 1972):[34]

[32] The depth and extent of Congress' awareness of the problem, as we shall show, is questionable. It certainly was totally unaware of the substantial impact exerted by the payment in New York of unemployment compensation to strikers on collective bargaining and strikes which was proven for the first time in this case.

[33] Finding no controlling legislative intent either way, the First Circuit in *Grinnell* reversed the dismissal of the complaint which challenged payments to strikers under Rhode Island's unemployment compensation statute (almost identical to New York's), and remanded the case for trial. Its opinion blueprinted the kinds of proof on the preemption issue which should be adduced at trial by plaintiff. It is clear from the findings below in the case at bar that that proof has been supplied here. The *Grinnell* case has yet to be tried.

[34] The Michigan law which was challenged in that case barred unemployment compensation in labor disputes, but it was being circumvented. The case has survived several motions to dismiss and is now on appeal to the Sixth Circuit on a certified question concerning the applicability of this Court's summary dismissal of the

> This court does not believe . . . that congressional inaction or failure to pass particular amendments to unemployment tax laws results in a definitive statement of congressional intent.

The district court in the case at bar twice reviewed the same checkered legislative history as in *Grinnell, Hawaiian Telco* and *Dow,* and reached the same conclusion, initially on the State's motion for summary judgment, and subsequently in its decision after trial (Pet. 47a-48a, 55a-56a). Another district judge in New York, presented with the same issue of congressional intent, similarly found it inconclusive:

> Conflicting inferences may be drawn from the legislative history accompanying the federal labor laws such that congressional intent is difficult to fathom. [Mem. and Order, p. 5, *American Broadcasting Cos.* v. *New York State Dep't of Labor,* 77 Civ. 2995 (S.D.N.Y. June 30, 1977) (Cannella, J.)]

Thus, the Second Circuit's decision in this case stands virtually alone in reading the legislative history as dispositive of the preemption issue here posed.[35] The plain fact is

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appeal in *Kimbell, Inc.* v. *Employment Security Comm'n,* 429 U.S. 804 (1976), for lack of a substantial federal question. *Dow Chem. Co.* v. *Taylor,* 428 F. Supp. 86 (E.D. Mich. 1977), *certified to 6th Cir.* (E.D. Mich. May 19, 1977) (No. 77-8064).

[35] This Court summarily dismissed, for want of a substantial federal question, the appeal in *Kimbell, Inc.* v. *Employment Security Comm'n,* 429 U.S. 804 (1976), from a decision of the New Mexico Supreme Court upholding that state's payment of unemployment compensation to strikers in certain limited circumstances. That case involved a different statute and a minimal record on impact. The state court's decision on review, moreover, did not consider legislative intent. Both of the courts below distinguished *Kimbell* from the case at bar (Pet. 7a n.2, 48a-53a). The summary dismissal in *Kimbell,* of course, is not binding on this Court. *Edelman* v. *Jordan,* 415 U.S. 651, 670-71 (1974).

that Congress has not authorized the payment of unemployment compensation to strikers in the NLRA or in the Social Security Act of 1935, now the Federal Unemployment Tax Act, 26 U.S.C. §§3301-3309.

If any inferences and conclusions may be fairly drawn from the legislative history they are that (a) Congress sought in the NLRA, as one of its prime purposes, to structure a system of collective bargaining free of government interference and, in doing so, to strike its own balance among the competing interests of the respective parties in collective bargaining, all to the exclusion of state laws which seek to accommodate those same interests (*see* Point I, *supra; see also, Lodge 76, IAM,* 427 U.S. at 140 n.4, 149-51), (b) Congress never intended that states be permitted to interfere with this system, or that they be permitted to alter the balance it had so delicately struck, by way of laws granting unemployment compensation to strikers, (c) where Congress intended to assist strikers financially, it has expressly done so and (d) where it has expressly considered the issue, in setting up an unemployment insurance system for the District of Columbia, Congress determined that strikers should be denied unemployment benefits (see p. 48, *infra*).

In addition to the instances of faulty analysis previously discussed—which undermine the very foundations of the opinion below and, in themselves, call for its reversal—the Court of Appeals' opinion proceeds on the basis of numerous other errors which we shall now discuss *seriatim.*

A. *The Opinion Virtually Ignores The History Of The NLRA And Congress' Intent, As Found By This Court, To Shield The Labor Policy Created Therein Against Offending State Unemployment Insurance Enactments.*

It is significant that the miscellaneous items of congressional history assembled by the court below include but a single reference to the NLRA as enacted in 1935.[36] The omission of any discussion of the purposes sought to be achieved by Congress in the NLRA is especially telling in a case such as this.

The opinion, instead, is almost totally preoccupied with the history, purposes, provisions and proposed amendments of the 1935 Social Security Act. It places substantial and, indeed, virtually controlling reliance on Congress' failure in that Act expressly to forbid the payment of unemployment benefits to strikers. To the court below the unemployment insurance scheme devised by Congress, with the exception of the few standards specified therein, granted to the states total freedom to set up any unemployment compensation system they wished where strikers were concerned; and each state could "serve as a laboratory" and "try novel social and economic experiments without risk to the rest of the country" (Pet. 11a).

That Congress wished to leave the question of benefits to strikers in the hands of local officials, held the Court of Appeals, may be inferred not only from the "fact that the matter has long been a political 'hot potato' ",[37] but also

[36] It notes that the NLRA "makes no mention of unemployment compensation" (Pet. 8a).

[37] This purely speculative explanation in a field where virtually every issue generates its own heat would, if adopted, invite ever-widening state incursions into the areas of federal labor law based on congressional inaction.

because "the national interest can be served as well by individual State experimentation as by enforced national uniformity" (Pet. 15a).

But had the Court of Appeals given due weight—or indeed any weight—to the objectives Congress sought to accomplish in the NLRA, it would perforce have recognized that it is "enforced national uniformity" that was and remains the guiding rationale and motivating factor underlying the federal labor laws. This Court has said that the primary factor which led Congress to enact "a comprehensive national labor law" was

> the perceived incapacity of common-law courts and state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflicts and for equitably and delicately structuring the balance of power among competing forces so as to further the common good. [*Lockridge*, 403 U.S. at 286]

Senator Williams, the current Chairman of the Senate Labor Committee and the chief sponsor in the Senate of the most recently enacted amendments to the NLRA concerning health care institutions, also recognized this factor in 1974, during the debate on those amendments when he said:

> [T]he general purpose of the National Labor Relations Act, as interpreted by the Board and the courts, is to attempt to establish a uniform pattern of collective bargaining rules nationwide, without local variation. [120 Cong. Rec. 22575 (1974)]

The national interest in labor relations—promoting labor peace—is not served by local "experimentation" but, as recognized both by Congress and by this Court, may be

attained only through a uniform, comprehensive national labor policy. In finding power in the states to subordinate the national labor policy to state-by-state decisions concerning the allowance of unemployment insurance benefits to strikers, the decision below attributes to Congress an intent to permit frustration of its own basic purpose in enacting a comprehensive federal labor law. There is no room for believing Congress intended to tolerate state laws, such as New York's, which deal specifically with the bargaining power of parties in industrial controversies,[38] since it was a primary objective of Congress in enacting the NLRA to protect the balance of bargaining power from such state tampering. Surely such a conflict of purpose may not be inferred in the absence of "a positive expression of congressional intent."

B. *The Court of Appeals Did Not Consider The Importance Of The Federal Policy Into Which New York State Has Intruded Or The Extent Of That Intrusion.*

The preemption doctrine "is to a great extent the result of this Court's on-going effort to decipher the presumed intent of Congress in the face of that body's steadfast silence." *Sears,* 46 U.S.L.W. at 4448 n.12. Although

[38] The feature of New York's law disputed here (N.Y. Labor Law § 592.1 (McKinney 1977), quoted at p. 3, *supra*) is not one of general application which might occasionally be invoked in, or impact on, a labor dispute (as, *e.g.*, state laws dealing with torts and contracts, or in certain limited circumstances, state laws against trespass—as was involved in *Sears,* 46 U.S.L.W. 4446). On the contrary, the New York statute, in Section 592.1, deals specifically with the benefit rights of persons who lose employment because of industrial controversy and avowedly seeks to strike a balance among the interests of the parties to a labor dispute by withholding unemployment compensation for a fixed period and then intervening to aid the strikers at the expense of their employer. Such was the finding of the Court of Appeals (Pet. 12a n.5).

the areas preempted by the federal law, and thereby withdrawn from the states, are not "susceptible of delimitation by fixed metes and bounds," "[o]bvious conflict, actual or potential, leads to easy judicial exclusion of state action." *Garmon,* 359 U.S. at 240, quoting from *Weber,* 348 U.S. at 480-81. The Court of Appeals in the case at bar, itself having recognized the conflict between the federal labor policy and New York's law,[39] was required, we submit, to exclude the state law and affirm the District Court below.

Were the conflict not as obvious as the one here, the court would have been required, at the very least, to consider the significance of the federal policy and the extent of state interference therewith as a part of the process of "decipher[ing] the presumed intent of Congress." This is a far "more complicated and perceptive process than is conveyed by the delusive phrase 'ascertaining the intent of the legislature,' " *Garmon,* 359 U.S. at 239-40, for labor preemption questions are of a "Delphic nature, to be translated into concreteness by the process of litigating elucidation." *IAM* v. *Gonzales,* 356 U.S. 617, 619 (1958).

Yet the Court of Appeals completely withheld consideration of, or even comment on, the nature and importance of the national policy involved in this case and its central place in the labor scheme structured by Congress. It denied, moreover, adequate—or indeed any—weight in its calculations to the substantial dimensions of the interference proven below through the "process of litigating elucidation."[40] Had the court given these considerations

[39] Pet. 17a.

[40] This Court recently observed that, under the preemption doctrine, the determination of whether a state's law stands as an obstacle to the accomplishment and execution of the full purposes

the weight they deserved, and which the law commanded, it undoubtedly would have reached a different result.

C. *This Court's Decision In* Nash *Stands Foursquare Against The Inference Drawn Below.*

The rationale of the Court of Appeals' opinion in this case is that, save for the few exceptions specifically written into the federal unemployment insurance law,[41] each state enjoys the right to establish any eligibility requirement for unemployment compensation it may wish in the area of striker benefits without regard to the federal labor policy. Focusing its attention on this mistaken notion—from which much of its analysis and reasoning proceeded—the Court of Appeals passed without mention this Court's decision in *Nash* v. *Florida Indus. Comm'n,* 389 U.S. 235 (1967), discussed *supra,* at pp. 27-29. That case, we submit, is dispositive in principle of the case at bar.

In *Nash* this Court ruled that the states are *not* free to establish unemployment compensation eligibility requirements which "frustrate" the purposes of the national labor legislation or stand as an "obstacle" to their full accomplishment. 389 U.S. at 240. There, as here, this Court was called upon to assess the consequences of a conflict in policy between the federal labor law and a state's unemployment compensation law. The decision reflected this Court's determination to carry out the intent of Congress

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and objectives of Congress and, accordingly must give way, "requires us to consider the relationship between state and federal laws as they are interpreted and *applied,* not merely as they are *written.*" *Jones* v. *Rath Packing Co.,* 430 U.S. 519, 526 (1977) (emphasis supplied).

[41] These exceptions are set forth in the Court of Appeals' opinion at Pet. 9a. They merely protect claimants from the denial of benefits for refusing to accept *new* work under certain specified conditions.

to outlaw all state unemployment insurance statutes which tend to "frustrate" the purposes of the federal labor legislation.[42] Had the Court of Appeals applied this restriction to New York's unemployment compensation law, it would have been constrained to affirm the District Judge's injunction against New York's interference with federal labor policy.

D. *Enactment Of The NLRA And Social Security Act of 1935.*

When Congress enacted the NLRA on July 5, 1935, New York's unemployment compensation statute was but two months old, having been passed April 25, 1935.[43] It was at that time the only state law providing benefits to strikers (originally only after a 10-week waiting period) of the approximately eight state laws passed in anticipation of the federal Social Security Act. At the time of this enactment, New York's law provided for a statewide pooled fund of employer contributions but employer contribution rates were *not* to be set by experience rating.

Neither the events occurring about the time of enactment of the NLRA nor their sequence suggest, much less

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[42] The state unemployment compensation eligibility requirement preempted in *Nash* was, as here, one that dealt with labor disputes. It, however, was applied to bar a claimant from benefits because she filed an unfair labor practice charge at the NLRB. That the offending eligibility requirement in *Nash* led to a denial of benefits, while the one at issue here granted benefits, is of no consequence. Nor is it relevant that different federal labor policies are involved in the two cases. What is significant is the principle laid down in *Nash* that state unemployment insurance laws must yield to federal superintendence in the labor field.

[43] The Court of Appeals erred in stating that the New York statute took "effect" on this date. The taxing provisions of the statute did not take effect until January *1936* and benefits to eligible claimants, including strikers, were not paid until after January 1, *1938,* several years after the NLRA was enacted.

support, a finding that Congress intended by that act to give the states free rein in establishing unemployment compensation to strikers payable out of their employer's pocket since (1) Congress' attention in legislating the federal labor scheme was on structuring a national policy concerning labor relations and not on state unemployment insurance statutes, (2) there is no evidence in the history surrounding the enactment of the NLRA or in the legislative reports concerning that Act that Congress, in 1935, was actually aware of the strike provisions contained in the New York law, and none was cited in the opinion below, and (3) New York did not begin paying benefits or introduce experience rating until years after the NLRA was enacted.

To say under these circumstances that Congress intended to tolerate the destructive impact found below in this case on one of its most significant policies, when the impact was not even apparent until long after the law embodying that policy was adopted, is a pure *non sequitur*. Moreover, the New York statute creating the impact itself has been materially changed on numerous occasions after the NLRA was adopted. The nature and import of some of these changes is discussed at greater length at pp. 50-52, *infra*.

Similarly, no inference of congressional approval of New York's subsidization of strikers may be drawn from the history surrounding the Social Security Act. Congress did not anticipate that unemployment compensation programs would be extended by the states to strikers. The entire unemployment insurance system was established in response to the experience of the Great Depression of the early 1930's. The problem of unemployment at that time had become "national in area and dimensions" and there

"was need of help from the nation if the people were not to starve." *Steward Machine Co.* v. *Davis,* 301 U.S. 548, 586 (1937) (per Cardozo, J.). The Social Security Law of 1935, which set up the program, was to "cushion the shock of seasonal, cyclical, or technological unemployment" for those involuntarily unemployed. *Minter,* 435 F.2d at 994-95. This Court described the objective of the 1935 Social Security Act as follows:

> The objective of Congress was to provide a substitute for wages lost during a period of unemployment *not the fault of the employee.* [*California Dep't of Human Resources Dev.* v. *Java,* 402 U.S. 121, 130 (1971); emphasis supplied]

Strikers do not fall within the contemplated category of beneficiaries described above. Thus their eligibility in New York for unemployment compensation not only runs counter to the NLRA, but also expands and, in the process, subverts the purposes envisioned by Congress in enacting the federal unemployment insurance system. This expansion is not authorized by the 1935 Social Security Act or by any other federal law.

This conclusion is confirmed by the fact that the American system was patterned after the British Unemployment Insurance Act as it existed in the middle 1930's and that legislation made no general provision for the payment of benefits to strikers: "If unemployment was the result of a labor dispute, it was not compensable." Haggart, *Unemployment Compensation During Labor Disputes,* 37 Nebr. L. Rev. 668, 686-87 (1958). The only exception was where the striker was terminated and his job was filled. *See Hawaiian Telco,* 405 F. Supp. at 287.

It was not unexpected then that in 1936 the independent federal Social Security Board (which in its advisory role was called upon to draft a model unemployment insurance bill to aid the states in drafting legislation to conform with the federal enabling law) drafted a model which expressly denied benefits to strikers. Social Security Board, Draft Bills for State Unemployment Compensation of the Pooled Fund and Employer Reserve Account Types, §1(5) (rev. ed. Jan. 1937). This is especially significant because the Social Security Board was presumably aware of the legislative history and background of the Social Security Act and in drafting its model bill had undertaken to follow the will of Congress. The striker disqualification contained in the model bill was followed in virtually all of the states.[44]

Consistent with, and we believe supportive of, the proposition that Congress never intended the states to use the unemployment compensation system to subsidize strikers, is the fact that when Congress acted to legislate a local unemployment insurance law for the District of Columbia it enacted a law which *denied* benefits to strikers.[45]

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[44] Only two states, Rhode Island and New York, pay strikers benefits outright in all strikes after a fixed waiting period. Some other states, like Hawaii, have laws which generally deny benefits except where an employer operates its business during the strike to 80% or more of capacity.

[45] Currently the law in the District of Columbia provides (D.C. Code § 46-310(f)):

> An individual shall not be eligible for benefits with respect to . . . [unemployment] as a result of a labor dispute still in active progress . . . .

Since 1935, the law in the District of Columbia, although amended, has always excluded strikers, Act of Aug. 28, 1935, ch. 794, § 10(a), 49 Stat. 950; Act of June 4, 1943, ch. 117, § 10(f), 57 Stat. 115; and Act of Aug. 31, 1954, ch. 1139, § 10(f), 68 Stat. 995.

The District of Columbia's law, enacted almost *simultaneously*[46] with the Social Security Act of 1935, was viewed by Congress as "putting into effect the provisions of the social security bill in regard to unemployment compensation for the District of Columbia" and was intended to "serve as a model to the States, to guide them in the enactment of unemployment compensation legislation." H. Rep. No. 858, 74th Cong., 1st Sess. 8 (May 9, 1935). In this "beacon light" for the states, Congress provided that an applicant for unemployment compensation "must not be engaged in a strike." 79 Cong. Rec. 8274, 74th Cong., 1st Sess. (May 27, 1935) (comments of Rep. Ellenbogen, the bill's manager).

The Court of Appeals brushed aside or simply ignored these developments which, if properly weighed and viewed in historical context, clearly militate against inferring congressional approval of benefits to strikers from the Social Security Act's silence on that subject. Instead, it found "particularly noteworthy" Congress' presumed awareness of New York's statute when it enacted the 1935 Social Security Act and saw as significant the fact that that legislation did not expressly exclude benefits to strikers, although Congress had been "urged to do so" (Pet. 10a-11a).

The *sole* basis for the finding that Congress was even aware of New York's law in 1935, cited in the opinion below, is Senate Report No. 628, 74th Cong., 1st Sess. 11 (1935), which accompanied the Social Security Act. While this Report refers to New York's law (as well as to other state laws) in several different contexts, *it does not contain any reference whatsoever to the striker benefit provision of the New York law.* Nor does the Report discuss or consider

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[46] The Social Security Act was enacted nine days after the District of Columbia's law.

the problem of unemployment compensation for strikers, either in general or in the context of specific state laws.

Even were Congress aware in 1935 of the striker benefit provision of New York's law, it would not have given Congress the slightest clue to the way in which subsequent amendments and increasing resort thereto were to balloon the impact of those striker benefits into the highly significant proportions shown in this case and recognized by labor unions generally (see pp. 7-17, *supra*). The New York law, as it existed in 1935, provided for a ten-week waiting period for strikers and no benefits were payable to anyone under it until more than two years later. It was not until 1945 that the law was changed to permit strikers to collect after only eight weeks. The maximum tax-free weekly benefit payable to strikers under the 1935 law was $15, with eligibility extending for up to 16 weeks. During the CWA strike involved in this case, maximum benefits were $75 payable for up to 52 weeks. Maximum benefits today are $115, increasing to $125 in September 1978, and are normally payable for at least 26 weeks. Over the years, the duration of benefits has been extended for as much as 52 weeks under extended benefits legislation. N.Y. State Dep't of Labor, A History of Unemployment Insurance Legislation in the United States and New York State 1935-1973 (Dec. 1973); N.Y. State Dep't of Labor, Labor Research Report 1977—No. 87: Historical Review of The Unemployment Insurance Program In New York State, 1935-1977 (Oct. 1977).

The experience rating system for setting tax rates (which, as previously noted, acts as the conduit through which struck employers are called upon to finance their striking employees) *was not adopted by New York until as late as*

1951, 16 years after the NLRA and Social Security Act were enacted. The taxable wage base of employer payrolls on which the tax rates were applied increased from $3,000 in 1938 to $4,200 in 1972 and to $6,000 in 1978 (*Id.*).

One of the drafters of New York's original law (called as a witness by the State) conceded he did not foresee the growing and changing impact of the strike benefit provisions on collective bargaining and strikes flowing from some of the foregoing amendments.[47] In 1946, Dr. Gray, then Chairman of New York's Unemployment Insurance Advisory Council, wrote:

> When the law was amended in 1941 by reducing the suspension period from 10 weeks to 7 weeks, it was argued that a shorter suspension period was warranted in view of the fact that the duration of strikes seldom, if ever, exceeded 7 weeks. Recent experience has demonstrated that many strikes have continued for periods beyond the 7 weeks' period.
>
> During 1946 approximately 2½ million dollars in benefits was paid to about 51,000 persons unemployed because of strikes beyond the seven-week suspension period. . . .
>
> The present provision of the law which permits workers who voluntarily become unemployed because of a strike, to receive benefits during the pendency of the strike runs counter to the objective of the law which is "the compulsory setting aside of financial reserves for the benefit of persons unemployed through no fault of their own." . . . Unemployment Insurance benefits, as such, should not be used as an instrument

[47] Thus, in *1935,* he had forecast incorrectly that strikes of more than ten weeks "would be unusual" and, therefore, "[t]here is . . . little likelihood that the benefits will be used to finance a strike." Gray, *Unemployment Insurance In The State Of New York,* 1935 N.Y.U.L.Q. Rev. 19, 32. *See* A. 367-68. He later was proved wrong and recommended discontinuance of striker benefits in New York State.

> for either party involved in a labor dispute. [Report of the New York State Unemployment Insurance Advisory Council for the year 1946, p. 5; *see* A. 368-71]

Edmund Witte's testimony (as Executive Director of the President's Committee on Economic Security) urging a bar against striker benefits before the Senate Finance Committee during hearings on the 1935 Social Security Act, was, we submit, accorded probative weight by the court below out of all proportion to its significance. Statements of witnesses before congressional committees ordinarily are given little, if any, weight by courts in determining congressional intent. Indeed, the statements of legislators themselves are often totally ignored by courts because they are not particularly revealing of the intent of Congress as a whole, with the exception of legislators who drafted or sponsored the bill. *E.g., McCaughn* v. *Hershey Chocolate Co.*, 283 U.S. 488, 493-94 (1931), and cases cited therein. The district court in *Hawaiian Telco* saw such testimony as not significantly revealing on the question of Congress' intent:

> Careful examination of the legislative record, however, does not reveal whether Congress ever expressly considered these recommendations . . . . [405 F. Supp. at 285]

E. *The 1947 Taft-Hartley Amendments.*

The court below cited as support for its conclusion, a 1947 proposal, deleted without comment by a congressional conference committee, which would have excluded a striker collecting unemployment compensation from all rights under the NLRA as amended. The significance of this deletion was correctly assessed by the First Circuit in *Grinnell*:

> Given this silence, the enormous political controversy surrounding the Taft-Hartley Act, and the consequent need for compromises, perhaps unreasoned or hasty, we cannot read this deletion and the subsequent approval of the conference bill as specific congressional resolution of the problem. [475 F.2d at 455][48]

There are an unlimited number of possible explanations of why the proposal did not emerge from the conference committee. Whatever the true explanation may be, its relevance in determining the presumed intent of Congress formed in the controlling year of 1935 when the NLRA and Social Security Act were enacted, is questionable. This Court has frequently observed that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Price*, 361 U.S. at 313.

F. *The 1969 Proposal To Amend The Federal Unemployment Tax Act.*

The court below also relied on Congress' failure in 1969 to adopt President Nixon's proposal to prohibit the payment of benefits to strikers. The entire bill, of which this proposal was but one part, was not enacted. As previously discussed with regard to the 1947 proposal made in connection with the Taft-Hartley amendments, evidence concerning the intent of a subsequent Congress forms no basis for inferring the intent of an earlier one. And as already discussed in detail, congressional silence or inaction is a poor guide to legislative intent.

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[48] Even within the House, its Majority and Minority Committee Reports, as noted by the court below, read the legislative history concerning this problem in markedly different ways (Pet. 13a), and the Senate version of the law was silent on the subject.

As for Committee Chairman Wilbur Mills' statement, the *Grinnell* court wrote:

> We are aware of the importance and power of the House Ways and Means Committee and of the significance of its Chairman's statements on bills within its jurisdiction. Yet, in the absence of any floor amendment or debate related to that particular change in either house, and of any real consideration of the issue at any level in the Senate, we cannot take the House Committee's deletion and Congress' subsequent approval of the substitute bill, as a clear indication of the intent of the entire Congress not to preempt unemployment payments to strikers. [475 F.2d at 456]

When viewed against the strong federal policy protecting the collective bargaining process from state interference, the failure of scattered bills offers insufficient probative evidence from which a conclusion can be drawn that Congress consciously elected to permit state interference with the federal labor scheme in this area.[49]

G. *Misplaced Reliance By The Court of Appeals On The Hodory Opinion.*

The Second Circuit's reliance on this Court's decision in *Ohio Bureau of Employment Servs.* v. *Hodory,* 431 U.S. 471 (1977), is misplaced. *Hodory,* addressing a constitutional question under the Fourteenth Amendment, merely holds that Ohio's denial of unemployment compensation to "innocent bystanders" (*viz.,* non-striking employees laid off

[49] The Second Circuit itself observed in an earlier preemption case that " 'unsuccessful attempts at legislation are not the best guides to legislative intent'—certainly not as to the intent of . . . [a prior] Congress which passed the legislation here at issue." *Wisdom* v. *Norton,* 507 F.2d 750, 757 (1974) (footnotes omitted), quoting in part from this Court's opinion in *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 382 n.11 (1969).

in another establishment), while granting benefits to locked-out employees, was not so irrational as to violate the Equal Protection Clause of that amendment. The only claim of federal preemption considered in that case was that

> neither the Social Security Act nor the Federal Unemployment Tax Act intended to restrict the States' freedom to legislate in this area. [431 U.S. at 488-89]

Indeed this Court, in *Hodory,* explicitly reserved the labor law preemption issue for another day. 431 U.S. at 475 n.3.

The passage from *Hodory* quoted in the opinion below (Pet. 9a-10a) (when "Congress wished to impose or forbid a condition for [unemployment] compensation, it was able to do so in explicit terms") was relied upon by the court to support the proposition that, in the absence of an explicit provision forbidding compensation to strikers, congressional tolerance of such payments must be inferred, regardless of their adverse impact on the federal labor policy. If the quoted passage from *Hodory* permitted such a conclusion, however, there would have been no need to reserve the labor preemption question. Moreover, such a reading is at odds with the Court's holding and analysis in *Nash.* The plain fact is that Congress in the 1935 Social Security Act did not authorize any interference with or frustration of its national labor policy.[50]

[50] The Court in *Hodory* recognized the potential impact of a state's grant of benefits in strike situations:

> The only way for the employer to stop these rising costs is to settle the strike so as to return the employees to work. *Qualification for unemployment compensation thus acts as a lever increasing the pressures on an employer to settle a strike.* [431 U.S. at 492; emphasis supplied]

H. *When Congress Intended To Grant Assistance To Strikers, It Was Openly Provided In Express Terms.*

The Second Circuit's reference to other laws wherein Congress *expressly* permitted financial aid to strikers (Pet. 15a-16a) provides no support for its conclusions in this case and, indeed, cuts the other way.

The congressional scheme enacted in the Railway Labor Act, 45 U.S.C. §§151 *et seq.*, ("RLA") is entirely different from that in the NLRA. It provides the machinery for substantial government intervention, up to and including mediation, arbitration, and the formation of Emergency Boards, rather than the free collective bargaining envisioned by the NLRA. Congress granted unemployment benefits *only* to striking railway employees who follow the procedures mandated by the RLA. Otherwise, no benefits are paid. 45 U.S.C. §354; *Railway & S.S. Clerks* v. *Railroad Retirement Bd.*, 239 F.2d 37 (D.C. Cir. 1956).

This is in marked contrast to the fuller freedoms to strike and bargain under the NLRA without exhausting or being interfered with by governmental "procedures" and actions.[51] The District Court below noted that the labor scheme created by Congress for the railroad industry, with its "elaborate statutory machinery provid[ing] for substantial government intervention in the *entire* strike process . . . rather than the free collective bargaining envisioned by the

[51] That the scheme in the RLA has resulted in other than free collective bargaining is emphasized by the recommendation to Congress in 1971 by the then Secretary of Labor James D. Hodgson that the scheme be altered by discontinuing payment of unemployment compensation to strikers because of its interference with free collective bargaining. Statement of Secretary of Labor James D. Hodgson on June 15, 1971, before the Senate Labor Subcommittee on S. 560, The Emergency Public Interest Act. The entire bill, of which this was but one part, failed to pass.

NLRA," presents a "unique situation" which is not analogous to that presented in this case (Pet. 47a-48a; emphasis court's; footnote omitted).

The true significance of the RLA here is that when Congress intended to grant unemployment compensation to strikers it did so, openly, clearly and affirmatively. The states may not treat its failure to do so as to other strikers as a vacuum which they may enter at will and on their own terms.

Congress has also affirmatively acted in another area to permit financial assistance to strikers and to accommodate the federal labor policy to other objectives. Thus in situations of total economic deprivation, and upon a showing of *need*, Congress has provided for the disbursement of food stamps. Food Stamp Act, 7 U.S.C. §2011.[52]

Thus where Congress by the grant of public assistance to strikers intended to alter the collective bargaining balance which it had created under the federal labor laws, it has expressly so provided. Its failure here to do so manifests an intention not to do so. *Cf. California* v. *Taylor*, 353 U.S. 553, 564-65 (1957).

I. *The Age of New York's Law.*

The Second Circuit's reference to the age of New York's law does not increase the "probative value" of Congress' inaction as the court apparently believed (Pet. 16a). For

[52] States, however, may under existing HEW regulations deny welfare benefits to dependent children of indigent strikers. *Batterton* v. *Francis*, 432 U.S. 416 (1977). This Court, while upholding these regulations under the federal welfare laws, refused to decide and expressly left open the question of the validity of welfare payments to strikers under the federal labor laws. 432 U.S. at 424 n.7.

the law on preemption is replete with examples of state laws preempted after the passage of extensive periods of time. The several state enactments preempted in *Garmon, supra,* ranged (at the time of this Court's decision in 1959) anywhere from 12[53] to 26[54] to 87[55] years of age. The pre-empted state laws nullified by this Court's decisions in *Lockridge, Morton* and *Weber, supra,* were Idaho's common law of contract, Ohio's common law of secondary boycotts and Missouri's common law of secondary boycotts, respectively. A 27-year old law was preempted by this Court in *Beasley* v. *Food Fair, Inc.,* 416 U.S. 653 (1974), and one of 16 years' vintage was nullified in *Street, Elec. Ry. & Motor Coach Employees, Div. 1287* v. *Missouri,* 374 U.S. 74.[56]

It would seem that the preoccupation of the opinion below with the passage of forty years since enactment of New York's statute blinded it to the perceptions which the trial record in this case yielded as to the extent of that statute's infringement upon modern-day collective bargaining.

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[53] California Labor Code §§ 1115-18.

[54] California Labor Code § 923.

[55] California Civil Code § 1708.

[56] The First Circuit struck down Massachusetts labor laws ranging from 22 to 52 years of age in *General Elec. Co.* v. *Callahan,* 294 F.2d 60 (1961), *cert. dismissed,* 369 U.S. 832 (1962). And in *Oil, Chem. & Atomic Wkrs.* v. *Arkansas Louisiana Gas Co.,* 332 F.2d 64 (10th Cir. 1964), a federal court nullified a state statute 56 years old on labor preemption grounds.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Second Circuit Court of Appeals should be reversed.

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Respectfully submitted,

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